U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

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In the Matter of:

Case No.: 2001-AIR-00004

JAY S. BODINE,
Complainant,

v.

INTERNATIONAL TOTAL SERVICES,
Respondent.

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RECOMMENDED DECISION AND ORDER DISMISSING APPEAL AS UNTIMELY

Complainant, Jay Bodine, by motion received on September 11, 2001, moves for an *Order* dismissing this matter arising under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. Section 42121, as untimely. On September 14, 2001, Respondent submitted a *Notice of Stay*, pursuant to a petition for relief filed under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of New York. On September 20, 2001, the undersigned administrative law judge issued an *Order* continuing the hearing scheduled for September 26, 2001 in Ogden, Utah, and scheduling responses to Complainant's *Motion to Dismiss*.

Pursuant to a telephone conference between the parties and the undersigned administrative law judge, held on September 19, 2001, Respondent was given an extension until September 29, 2001, to respond to Complainant's *Motion to Dismiss* and to address the application of the automatic stay provisions of the Bankruptcy Act to this proceeding. Complainant was given ten (10) days from receipt of Respondent's response in which to reply. The Department of Labor requested and was granted the opportunity to address the issue of the application to this proceeding of the exemption from the automatic stay provision. However, none of the parties submitted a response to Complainant's *Motion to Dismiss* or addressed the applicability of the automatic stay provisions of the Bankruptcy Act. On September 26, 2001, this Office received a *Notice of Withdrawal* from Respondent's

counsel.

I
Untimely Hearing Request

Under the Act, the Secretary must conduct an investigation and notify the complainant and the person identified in the complaint of the Secretary's findings within 60 days after the date of receipt of a complaint. See 49 U.S.C. § 42121 (B)(2)(a). The Act further mandates that "not later than 30 days after the date of notification of findings... either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record." *Id.* If a party fails to request a hearing within the 30 day period, pursuant to the Act, the preliminary order is deemed a final order that is not subject to judicial review. *Id. See also, Howlett v. Northeast Utilities,* ARB No. 99-044, ALJ No. 1999-ERA-1 (ARB Mar. 13, 2001)(ARB affirmed ALJ's decision to refuse to toll five-day time period, despite a clerical error); *Staskelunas v. Northeast Utilities Co.*, 1998-ERA-8 (ARB May 4, 1998)(ARB affirmed ALJ decision to dismiss case for Complainant's failure to file timely request for a hearing and failure to respond to an order).

In this case, on July 11, 2001, the United States Department of Labor Occupational Safety and Health Administration ("OSHA") issued Findings and a Preliminary Order stating that the complaint filed by Complainant had merit and that he was entitled to certain compensation under the Act. OSHA delivered notice to both Complainant and Respondent via certified mail the same day. However, Respondent failed to submit objections to the Secretary's findings until August 20, 2001. Even allowing an additional 5 days to the prescribed period in which to submit objections, the Respondent's filing was 5 days beyond the deadline and upon operation of law, the Secretary's preliminary findings became final on August 15, 2001.[1]

Furthermore, Respondent has failed to respond to the *Order* issued on September 20, 2001, which gave Respondent the opportunity to submit a response to the *Motion to Dismiss* and to offer a rationale for affording Respondent an equitable tolling of the deadline to submit objections to the Secretary's findings. *See Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001) (recognizing that the time limit for filing a request for a hearing is

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[1]29 C.F.R. § 18.4(c)(3) provides that "whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period." As such, Respondent, having been served by certified mail, was entitled to file a request for a hearing with the Chief Clerk of the Office of Administrative Law Judges within 35 days of July 11, 2001, or August 15, 2001.

not a jurisdictional prerequisite, and is subject to the principles of equitable tolling). Therefore, since the Respondent failed to file a request for a hearing on the record within the time limit proscribed under the Act and nothing in the record mitigates this omission, the Complainant's *Motion to Dismiss* is granted and the Secretary's findings of July 11, 2001 are by operation of law a *Final Order*.

II
Automatic Stay

Respondent's Notice of Stay filed on September 14, 2001 provides notice that Section 362 of the Bankruptcy Act restrains and enjoins commencement or continuation of an administrative action or proceeding against the debtor. However, Section 362 does not preclude the issuance of this *Recommended Decision and Order Dismissing Appeal*. Section 362(a)(1) provides that a bankruptcy petition generally stays proceedings against a debtor. 11 U.S.C. § 362(a)(1). However, at the time Respondent filed a petition for bankruptcy on September 13, 2001, there were no proceedings pending since the Secretary's findings became final on August 15, 2001, as a result of the Respondent's failure to submit a timely request for a formal hearing within the time period specified under the Act. Thus, there is no matter within the jurisdiction of this Office to stay pursuant to the automatic stay provision of the Bankruptcy Act.

Furthermore, assuming this Office had jurisdiction over this matter and the Secretary's findings had not become final on August 15, 2001, this *Recommended Decision and Order* would not be stayed by section 362(a)(1), since this proceeding is exempt from the automatic stay provisions as it arises under regulations enacted to promote public health and safety. Subsection 362(b)(4) provides that a bankruptcy petition does not act as a stay "under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." The Senate Report accompanying the Bankruptcy Reform Act of 1978 explains that the purpose of the automatic stay provision is to allow debtors the ability to restructure or reorganize without the added difficulty of being subject to ongoing litigation. The Senate Report states that:

> The automatic stay is one of the fundamental debtor protections by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him to bankruptcy.

Senate Report No. 95-989, 95th Cong., 2d sess., 1978 U.S. Code Cong. and Adm. News at 5840.

However, the exemption is not without limits, particularly in regards to governmental agencies enforcing regulations that protect public health and safety. In addressing the exemption to the automatic

stay provision contained at section 362(b)(4), the House Report accompanying the Bankruptcy Reform Act of 1978 states:

> This section is intended to be given narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect pecuniary interest in property of the debtor or property of the estate.

House Report No. 95-595, 95th Cong., 2d Sess., 1978 U.S. Code and Cong. and Adm. News at 5787.

In light of this legislative history, subsection 362(b)(4) has been construed as an exemption for equitable actions brought by governmental units to correct violations of regulatory statutes enacted to promote health and safety. *See Brock v. Marysville Body Works, Inc*., 829 F.2d 383 (3d. Cir. 1987)(enforecement of an OSHA citation permitted); *Brock v. American Messenger Service, Inc.*, 65 B.R. 670 (D.N.H. 1986)(enforcement proceeding under Fair Labor Standards Act at Department of Labor exempt from automatic stay); *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986), cert. denied 479 U.S. 910 (1987)(judgment may be entered against debtor in a Title VII discrimination suit); *In re Perez*, 61 B.R. 367 (E.D. Cal. 1986)(assessment of civil monetary penalty under Migrant and Seasonal Agricultural Worker Protection Act permitted); *Brock v. Rusco Industries, Inc.*, 842 F.2d 270 (11th Cir. 1988), cert. denied, 109 S. Ct. 221 (determination of liability for back wages under Fair Labor Standards Act permitted); *N.L.R.B. v. P*I*E* Nationwide, Inc.*, 923 F.2d 506 (7th Cir. 1991(fair labor standards); *and Eddleman v. U.S. Dept. of Labor*, 923 F.2d 782 (10th Cir. 1991).

In this case, Respondent, who is engaged in airport security operations, fired Complainant after he reported certain alleged "security breaches" by Respondent to various authorities. After an investigation into the complaint, the Secretary found that the "complainant [was] 'protected' under the law for providing information to regulatory agencies about violations or alleged violations of any order, regulation or standard related to air carrier safety." There is no greater example of regulations designed to ensure public safety than those of the AIR which regulate commercial air travel. Certainly, the Department's exercise of their power to investigate and enforce this power through sanctions and other assessments is not subject to the automatic stay provisions of the Bankruptcy Code. Such reasoning would go against the very purpose of the AIR and the automatic stay provision of the Bankruptcy Act.

In *Nelson v. Walker freight Lines, Inc.*, 87-STA-24 (Sec'y July 26, 1988), an analogous case arising under the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. app.§ 2305 (1982), the Secretary found that the automatic stay provisions did not apply to the proceedings since the statutory language and legislative history of the STAA encompass Section 2305 actions. The Secretary reasoned that even though these actions do not require the filing of a complaint by a federal administrative unit, these whistleblower actions were nonetheless "proceedings by a governmental unit"

within the meaning of the automatic stay exemption since they are actions to enforce our national safety policy.

In this case, like the complaint in *Nelson*, the Department of Labor notified this Office that the complainant's complaint was investigated under the AIR and was found to have merit. Further, the Department of Labor filed an notice of appearance, stating that if any litigation ensued, the Department would be represented by an associate regional solicitor from the Denver, Colorado office. Therefore, the automatic stay provisions of the bankruptcy code are inapplicable to this complaint since the Department's action was within it's regulatory power to protect and promote our national air safety policy and constitutes "proceedings by a governmental unit" within the meaning of the automatic stay exemption.

Accordingly,

ORDER

IT IS HEREBY ORDERED that Complainant's *Motion to Dismiss* is GRANTED.

A

Thomas M. Burke

Associate Chief Judge

Washington, DC